Kentucky Supreme Court
No. 2015-SC-000235-DG

Jeffrey W. Murphy — **Appellant**

v.

Appeal from Boone Circuit Court
Hon. James R. Schrand, Judge
Case No. 2013-CR-00190

Commonwealth of Kentucky — **Appellee**

Reply Brief for Murphy

Submitted by:

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Certificate required by CR 76.12(b)

This will certify that a true and correct copy of this Reply Brief was mailed, first class postage prepaid, to the Hon. James R. Schrand, Judge, Boone Circuit Court, Boone County Justice Center, 6025 Rogers Lane, Suite 447, Burlington, Kentucky 41005-8149; the Hon. Jeffrey W. Fichner, Assistant Commonwealth's Attorney, 54th Judicial Circuit, P. O. Box 168, Burlington, Kentucky 41005; the Hon. Andrea M. Kendall, Assistant Public Advocate, 8311 U.S. 42, Suite 210, Florence, Kentucky, 41042; and the Hon. James C. Shackelford, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601, on February 22, 2016.

for Susan Jackson Balliet

PURPOSE OF BRIEF

This reply brief responds to issues raised by Appellee.

ISSUES TO BE ADDRESSED

1. Whether the Kentucky General Assembly intended all juvenile adjudications to be exempt from sex offender registration.

2. Whether KRS 17.510(6) and (7) are in apparent conflict, *in pari materia* and capable of harmonizing.

3. Whether sex offender registration imposed a civil disability or restraint on Murphy.

4. Whether the rule of lenity applies in interpreting the KSORA in a criminal prosecution against Murphy.

5. Whether KRS 635.040 dealing with juveniles is more specific and therefore controls over KRS 17.510(7) dealing with convicted persons.

6. Whether Appellee's Adam Walsh Act argument is not well taken.

POINTS AND AUTHORITIES

ARGUMENT

1. The Kentucky General Assembly does not intend juvenile adjudications to require registration as a sex offender.

In Kentucky's sex offender registration system, KRS 17.500 – 17.580, the General Assembly clearly and emphatically expressed the public policy that sex offender registration is required only of adults and youthful offenders convicted of sex crimes against minors, including those convicted but on "diversion."[1] KRS 17.500(5)(a) clearly limits registration to a "person eighteen (18) years of age or older at the time of the offense or any youthful offender, as defined in KRS 600.020." KRS 600.020(69) defines youthful offender as "any person regardless of age who transferred to circuit court under the provisions of KRS Chapter 635 or 640, and who is subsequently convicted in Circuit Court." KRS 635.505(2) defining juvenile sexual offender does not refer to a juvenile who was charged with failure to register.

That the KSORA categorically limits registration to those who have been "convicted" and excludes juvenile adjudications from registration is confirmed by KRS 17.510(6), which expressly defines registrants as those "convicted" in any state of a sex crime or criminal offense against a minor. It is also confirmed by a long history of Kentucky case law interpreting the word "convicted" to exclude juvenile adjudications. *Phelps v. Com*, 125 S.W.3d 237 (Ky. 2004) (juvenile adjudication is not a "conviction" for purpose of second offense enhancement for unauthorized use of a motor vehicle); *Manns v. Com*, 80 S.W.3d 439 (Ky. 2002) (language in Kentucky Rules of Evidence permitting impeachment by prior "conviction" does not include "adjudication" of the

[1] The statement at Appellee Brief page 5 that diversion is not a conviction is incorrect. A defendant must be convicted to be eligible for diversion. *Thomas v. Com.*, 95 S.W.3d 828 (Ky. 2003); *Prather v. Com.*., 301 S.W.3d 20 (Ky. 2009). A convicted defendant who is on diversion has simply not yet been sentenced. *Commonwealth v. Derringer*, 386 S.W.3d 123, 126 (Ky. 2012).

juvenile court); *Coleman v. Staples*, 446 S.W.2d 557, 560 (Ky. 1969) (juvenile adjudication in federal court is not a conviction for purposes of impeachment by prior conviction); and *Alexander's Adm'r v. Kentucky Bankers Ass'n*, 237 Ky. 232, 35 S.W.2d 287 (1931) (use of "conviction" in offer of reward did not include juvenile adjudication).

A few years ago, when "it became widely known that millions of [Kentucky] dollars were being spent to incarcerate juvenile offenders indiscriminately," the General Assembly enacted SB 200 in order to effect "sweeping changes to the existing juvenile code." *Q.M. v. Com*, 459 S.W.3d 360, 362 (Ky. 2015). But even before SB 200 became effective in 2014 and 2015, the Kentucky Unified Juvenile Code, KRS Chapters 600 to 645, already constituted a "broad mandate of protection and rehabilitation" for the benefit of Kentucky children. *Id.,* at 366. KRS 17.510(7) must be read in light of KRS 17.510(6), the entire KSORA, the mandate of protection and rehabilitation in the Unified Juvenile Code, and the long history of Kentucky case law, all exhibiting Kentucky's public policy— resoundingly reaffirmed in SB 200—exempting juveniles from the stigma of criminal conviction. Kentucky has invested tremendously in a system that provides effective rehabilitative care for juveniles, including juvenile sexual offenders. *See* KRS 635.500 *et. seq.* (establishing a program for the treatment of juvenile sexual offenders). Kentucky's juvenile system will be significantly undermined if juvenile sexual offenders are allowed to be stigmatized by being required to register for up to 20 years or life for a juvenile offense and made subject to criminal prosecution for failing to file change of address.

Murphy was 16 when he offended in Michigan and 18 when he became homeless in Kentucky and failed to register. But the next youth charged with failure to register as a sex offender might easily be under 18. What is a juvenile court to do when a 14-year-old appears having committed the supposed "bad conduct" of failing to do something Kentucky does not require its own children to do? Our juvenile system is designed for dealing with serious antisocial conduct like robbery, murder, and sex crimes. What possible rehabilitative program could there be for a 14, 15 or 16-year-old who fails to file notice of change of address? Murphy arrived here in Kentucky an adjudicated juvenile offender and returned to Michigan a convicted felon with a year of adult prison under his belt. That should have not have happened. Kentucky's rehabilitative policy exempting juveniles from sex offender registration should be applied to all juveniles.

2. KRS 17.510(6) and KRS 17.510(7) are *in pari materia*.

Appellee argues that KRS 17.510(7) and KRS 635.040 are not *in pari materia*. Appellee Brief, 10-12. But Murphy has not claimed a conflict between KRS 17.510(7) and KRS 635.040. The conflict is between KRS 17.510(6) and KRS 17.510(7), with (6) plainly excluding juvenile adjudications from a registration requirement and (7) creating ambiguity by appearing to require ***all*** persons required to register elsewhere to register in Kentucky regardless whether their crime was committed as a juvenile:

> (6) **Any person who has been convicted in a court of any state or territory, a court of the United States, or a similar conviction** from a court of competent jurisdiction in any other country, or a court martial of the United States Armed Forces **of a sex crime or criminal offense against a victim who is a minor** and who has been notified of the duty to register by that state, territory, or court, or who has been committed as a sexually violent predator under the laws of another state, laws of a territory, or federal laws, or has a similar conviction from a court of competent jurisdiction in any other country, shall comply with the registration

requirement of this section, including the requirements of subsection (4) of this section, and shall register with the appropriate local probation and parole office in the county of residence within five (5) working days of relocation. No additional notice of the duty to register shall be required of any official charged with a duty of enforcing the laws of this Commonwealth.

(7) **If a person is required to register under federal law or the laws of another state or territory**, or if the person has been convicted of an offense under the laws of another state or territory that would require registration if committed in this Commonwealth, that person upon changing residence from the other state or territory of the United States to the Commonwealth or upon entering the Commonwealth for employment, to carry on a vocation, or as a student shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register within five (5) working days with the appropriate local probation and parole office in the county of residence, employment, vocation, or schooling. A person required to register under federal law or the laws of another state or territory shall be presumed to know of the duty to register in the Commonwealth. As used in this subsection, "employment" or "carry on a vocation" includes employment that is full-time or part-time for a period exceeding fourteen (14) days or for an aggregate period of time exceeding thirty (30) days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit. As used in this subsection, "student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade or professional institution, or institution of higher education.

KRS 17.510 (emphasis added)

Murphy's argument is that KRS 17.510(6) defines who is required to register as a sex offender as those who have been "convicted," including adults and youthful offenders, plus sexual predators, and KRS 17.510(7) was intended to define the circumstances, *i.e.*, *how* and *when* convicted sex offenders and sexual predators are required to register. See Brief for Appellant, 7-8. Murphy's position is that the COA Opinion below wrongly interprets KRS 17.510(7) as negating and overriding the clear exclusion of juvenile adjudications in KRS 17.510(6) if the adjudication occurred in another state:

> Although KRS 17.510(6) and portions of (7) require a criminal conviction to trigger the registration requirement, Murphy was charged and convicted of violating SORA because he was required to register under the laws of Michigan and, therefore, required to register in Kentucky. Proof that a person is required to register in another state is sufficient to establish that person must register under KRS 17.510(7). *Commonwealth v. McBride,* 281 S.W.3d 799, 805 (Ky.2009).

Murphy v. Com, 2015 WL 1880690, at 2 (Ky.App. 2015) (unpublished).[2]

In pari materia means "[o]n the same subject; relating to the same matter." *Com v. Davis*, 400 S.W.3d 286, 289 (Ky. App. 2013) [quoting Black's Law Dictionary 794 (7th ed.1999)]. Murphy has never argued that KRS 17.510(7) and KRS 635.040 are in conflict, and therefore there is no need to determine if they are *in pari materia*. What Murphy argues is that KRS 17.510(6) and (7) are two integral parts of a single statute that do appear to be in conflict and must be harmonized. KRS 17.510(6) and (7) are undeniably *in pari materia* because they deal with the same subject matter, sex offender registration. When KRS 17.510(6) and (7) are properly interpreted, their joint relationship with KRS 635.040 is also harmonious and apparent.

Appellee in its Brief at page 9 complains that the Kentucky General Assembly could have expressly excluded out-of-state juvenile adjudications from registration "in KRS 17.500(b) [sic] or 17.510(7)...." Likewise, the General Assembly could have unambiguously *included* out-of-state juvenile adjudications. To the extent KRS 17.510(7) is ambiguous, this Court is left to interpret it in light of its language, the policy choices the General Assembly has made, and the rules of statutory construction. As argued above, by using the term "conviction" in 17.510(6), the General Assembly unambiguously excluded juvenile offenses. The only question is whether by failing to

[2] Attached at Tab 1.

use the term "conviction" in the first as well as the second clause of KRS 17.510(7) the General Assembly intended to supersede the clear meaning of the preceding section (6), or whether instead (7) was intended to describe when and how section (6) applies. The plain policy of the General Assembly not to require juveniles to register as sex offenders and the rules of statutory construction favor the latter interpretation.

3. Sex offender registration imposes a civil disability or restraint.

Registering in Kentucky as a sex offender in 2011 imposed on Murphy the disabilities and restraints contained in KRS 17.545, effective since 2009. Under KRS 17.545 once he registered, Murphy was prohibited from living within 1,000 feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. Appellee cites dicta-on-dicta in *Buck v. Com,* 308 S.W.3d 661 (Ky. 2009) to support its argument that sex offender registration did not impose a civil disability on Murphy. But the dicta in *Buck* conflicts with the square holding in *Com v. Baker*, 295 S.W.3d 437 (Ky. 2009), cited in Brief for Appellant at pages 5, 12, and 13, that ***sex offender registration is a civil disability***.

The *holding* in *Buck* is that restraints and disabilities imposed by sex offender registration are not punishment. The further statement in *Buck* that registration is also not a civil disability is superfluous and incorrect. A restraint, disability, or penalty is either criminal or civil, and if the restraint imposed by registration is not a criminal punishment, as held in *Buck,* then it is a civil disability. The *Buck* court's statement that registration is not a civil disability is wrong. It is dicta expressly based on earlier dicta in *Hyatt v. Com,* 72 S.W.3d 566, 572 (Ky. 2002). The *Hyatt* case relied on in *Buck* is also an *ex post facto* case that holds— ***only***— that Kentucky's sex offender registration scheme is not penal in

nature for purposes of applying *ex post facto* principles. *Id.* at 572. The further statement in *Hyatt* that registration is not a civil disability or restraint is just as unnecessary, wrong, and superfluous to the holding in *Hyatt* as it is in *Buck*. Worse, *Hyatt* relies as support for its dicta on a Florida case that is distinguishable from *Hyatt, Buck*, and the case at bar, *Collie v. State,* 710 So.2d 1000 (Fla.Dist.Ct.App.1998), *cert. denied,* 525 U.S. 1058 (1998). *Collie* held that "registration requirements did not constitute a disability or restraint" *in Collie's case* because Florida's SORA restrictions *did not apply to Collie*:

> ...as we stated in the ex post facto analysis above, section 775.21(9)(b) is not applicable to Collie because his current offense was committed prior to its incorporation in the 1996 Act. [citation omitted] Therefore, we do not consider this provision to be an affirmative disability or restraint to Collie....

Id., 1009-10. Appellee has not claimed that the disabilities and restraints imposed under KRS 17.545 *did not apply* to Murphy upon registration as a sex offender. *Collie* is a distinguishable, stand-alone opinion, and the dicta it spawned does not apply to Murphy. This Court should overrule *Buck* to affirm that sex offender registration imposes a civil disability and restraint. As this Court squarely held in *Baker*, "We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint." *Id.* at 445.

4. The rule of lenity applies in interpreting any statute against a criminal defendant.

The rule of lenity is not only applied in interpreting a criminal statute. Appellee overlooks KRS 446.080(2), which states, "There shall be no difference in the construction of civil, penal and criminal statutes." The rule of lenity is a rule of statutory construction that is appropriate to be applied in the construction of civil, penal and criminal statutes. Neither of the cases cited by Appellee contradict this. In *Crouch v.*

Com, 323 S.W.3d 668, 675 (Ky. 2010), cited by Appellee, this Court remarked that "the rule of lenity is often invoked by criminal defendants seeking a more favorable construction of a statute...." Similarly the case of *White v. Com*, 178 S.W.3d 470, 484 (Ky. 2006), cited by Appellee, holds broadly that "[t]he rule of lenity requires any ambiguity **in a statute** to be resolved in favor of a criminal defendant." (emphasis added). KRS 17.510 is a "statute," and Murphy is a "criminal defendant." Under KRS 446.080(2) and under *Crouch* and *White* the rule of lenity applies because KRS 17.510 is a statute cited by the Commonwealth against Murphy in its attempt to uphold his criminal conviction. Ambiguity in KRS 17.510 must be resolved in favor of Murphy.

5. KRS 17.510(7) does not control over KRS 635.040.

Appellee argues at page 13 that KRS 17.510(7) controls over KRS 635.040 because it was enacted later and is more specific. This argument fails because KRS 17.510(7), while later enacted, is **not** more specific than KRS 635.040. In fact the opposite is true. KRS 17.510(7) speaks generally of "persons," and KRS 635.040 speaks specifically of juveniles, a sub-set of the more general category of "persons." When the General Assembly enacted KRS 17.510(7) it was fully aware of KRS 635.040, which states in plain language that no juvenile adjudication shall operate to impose any civil disability:

> "No adjudication by a juvenile session of District Court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication."

KRS 635.040

The General Assembly enacted KRS 17.510(7) knowing that KRS 635.040 was already on the books, *specifically* exempting and protecting juveniles. The legislature felt no need to repeat itself.

Appellee's argument that KRS 17.510(7) supersedes and controls KRS 635.040 asks this Court to agree that in enacting KRS 17.510(7) the General Assembly consciously sought to rescind the longstanding protection of juveniles contained in KRS 635.040 in order to discriminate against out-of-state juveniles moving to Kentucky. Murphy urges this Court that the General Assembly intended no such thing. The General Assembly **did not intend** in enacting KRS 17.510(7) to deny the equal protection of Kentucky's laws to those arriving here from out of state. *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 718-719 (Ky. 2012), *quoting Shawnee Telecom Resources, Inc. v. Brown,* 354 S.W.3d 542, 551 (Ky.2011) ("We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one...."). As argued in Murphy's Brief for Appellant, *passim,* KRS 17.510(7) was intended by the legislature to define the circumstances and timing of the registration requirement. It was **not** intended to rescind or amend KRS 635.040 in the unfair, arguably unconstitutional manner urged by the Commonwealth. There is no reason why KRS 635.040 and KRS 17.510(7)— properly interpreted to harmonize with KRS 17.510(6)— cannot both be given the full meaning and effect intended by the General Assembly.

6. AWA funding is not at issue; even if adopted, the AWA would not require Murphy to register.

Appellee's argument F. at pages 15-18 of its brief points to the federal "legislative history and public policy" contained in the Adam Walsh Act (AWA). But the AWA has not been adopted in Kentucky. The AWA requires sex offender registration for ***all***

juvenile adjudications, and by clearly exempting (at least) in-state juveniles Kentucky has chosen not to adopt the AWA, at least not in its entirety. Applying Kentucky's chosen policy of exempting juvenile adjudications *uniformly* to exempt both in-state juveniles and those arriving from out-of-state would not change Kentucky's status with regard to the AWA or its funding. It is the General Assembly's job to weigh costs and benefits, and the Kentucky General Assembly has spoken. Finally, Appellee does not dispute that the AWA would not require registration for the offense at issue in this appeal. See Brief for Appellant, page 18. Appellee's AWA argument is not well taken.

CONCLUSION

Appellant Murphy asks this Court to overturn the COA Opinion and to vacate and dismiss with prejudice his conviction for failure to register as a sex offender.

Respectfully submitted,

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